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No. 96-1163

In the Supreme Court of the United States

OCTOBER TERM, 1996

MALLOTT & PETERSON AND INDUSTRIAL INDEMNITY COMPANY, PETITIONERS

v.

BEATRICE STADTMILLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Section 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g), requires the prior written approval of an employer and its insurer when a "person entitled to compensation (or the person's representative)" settles an action against a third party who may be liable for a work-related injury, if the settlement is "for an amount less than the compensation to which the person (or the person's representative) would be entitled" under the LHWCA. The questions presented are:

1. Whether, as used in Section 33(g), the term "representative" includes an attorney who is not entitled to LHWCA compensation but serves as legal counsel for a surviving spouse in a lawsuit against a third party.

2. Whether respondent entered into a third-party settlement through her attorney when the attorney lacked actual or apparent authority to enter into such a settlement on her behalf and she neither ratified, nor obtained any proceeds from, the purported settlement.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the petition (Pet. ii), the Director, Office of Workers' Compensation Programs, was a respondent in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 98 F.3d 1170. The decision of the Benefits Review Board (Pet. App. 12-31) is reported at 28 Ben. Rev. Bd. Serv. (MB) 304, and the decision of the administrative law judge (Pet. App. 32-52) is not yet reported.

JURISDICTION

The court of appeals entered its judgment on October 24, 1996. The petition for a writ of certiorari was filed on January 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, requires maritime employers to pay compensation for work-related injuries that result in a disability to, or the death of, a covered employee, without regard to fault as a cause of the injury. See 33 U.S.C. 904, 908, 909. A person entitled to compensation under the LHWCA may also sue a third party who may be liable for the injury or death, without forgoing his or her right to compensation under the LHWCA, although the employer is entitled to offset such a third-party recovery in certain circumstances. See 33 U.S.C. 933(a) and (f).

Section 33(g)(1) of the LHWCA requires the prior written approval of an employer and its insurer when a "person entitled to compensation (or the person's representative) enters into a settlement with a third person" who may be liable for a work-related injury or death, if the third-party settlement is "for an amount less than the compensation to which the person (or the person's representative) would be entitled under [the LHWCA]." 33 U.S.C. 933(g)(1). A failure to obtain such prior written approval from the employer and insurer results in the termination of all rights to compensation and medical benefits under the LHWCA. 33 U.S.C. 933(g)(1) and (2).

2. Petitioner Mallott & Peterson is an employer subject to the LHWCA, and petitioner Industrial Indemnity Company is its insurer. Between 1940 and 1946, Delbert Stadtmiller (respondent's now-deceased husband) was exposed to asbestos while working for Mallott & Peterson. In June 1990, he filed a claim for LHWCA disability benefits for asbestos-related

cancer. Pet. App. 13-14. He died from that work-related condition in December 1990. In December 1991, his widow, respondent Beatrice Stadtmiller, filed a LHWCA claim for her husband's disability benefits as well as a LHWCA claim for death benefits on her own behalf. Pet. App. 14.

3. a. In February 1993, the parties submitted to the administrative law judge (ALJ) proposed stipulations settling all the issues regarding respondent Stadtmiller's claims under the LHWCA. Pet. App. 14. Pursuant to the parties' joint request and in light of the stipulations, the ALJ remanded the matter to the district director on February 26, 1993. Pet. App. 33.

On March 5, 1993, petitioners moved to rescind the stipulations and for entry of summary judgment denying respondent Stadtmiller's claim in its entirety, on the ground that respondent, through her attorney, had settled a civil lawsuit against a third party for the wrongful death of her husband, without obtaining petitioners' prior written approval of the settlement. Pet. App. 14, 33. Petitioners contended that, under Section 33(g), the purported settlement precluded respondent Stadtmiller from any entitlement to benefits under the LHWCA. Respondent Stadtmiller opposed petitioners' motion, contending that no settlement had occurred, and submitted supporting affidavits from respondent and her attorney in the civil suit. Pet. App. 35. Respondent Stadtmiller also contended that she had not authorized her attorney to settle her civil lawsuit against the third party, had not signed any settlement papers regarding that suit, and had not received any settlement money connected to that suit. *Id.* at 14-15, 34. She explained that the third-party defendant apparently

had provided her attorney in that lawsuit with funds that were offered in return for the settlement of a group of lawsuits, including respondent's, but that respondent had not been informed of the offer and had not accepted or rejected that proposed settlement. *Id.* at 34, 36-37.

b. The ALJ vacated the remand order, Pet. App. 33, and considered the merits of petitioners' motion. The ALJ denied petitioners' request for summary judgment because of the existence of a genuine issue of material fact. *Id.* at 35.

After a hearing, the ALJ denied petitioners' motion for rescission of the stipulations. Pet. App. 32-52. The ALJ found that it was clear that respondent Stadtmiller did not enter into a direct settlement with the third-party defendant in her civil suit. *Id.* at 44. The ALJ also found that no "representative," within the meaning of Section 33(g), had entered into a third-party settlement on respondent Stadtmiller's behalf. Pet. App. 44. The ALJ reasoned that, as used in Section 33(g), "representative" means "legal representative" as defined in Section 33(c) of the LHWCA, 33 U.S.C. 933(c). Pet. App. 44 n.2.[1] The

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[1] Section 33(c) governs cases in which a payment of LHWCA compensation is made into a special statutory fund under Section 44 of the LHWCA (33 U.S.C. 944), rather than to a person entitled to compensation. A payment of an award is made by an employer to the Section 44 fund when the Secretary determines that there is no person entitled under the LHWCA to compensation for the death of an employee that would otherwise be compensable under the LHWCA, *i.e.* where the compensable injury caused death and the decedent has no eligible survivors. In such a case, the employer must pay $5,000 to the Section 44 fund. 33 U.S.C. 944(c)(1). As a result of such a payment, the employer obtains the right, by virtue of

ALJ then concluded that the term "legal representative" means "a person who oversees the legal affairs of another," such as an executor of an estate or a court-appointed guardian, but does not include an attorney at law except when acting as an executor, guardian, or in a similar capacity. *Ibid.* (quoting in part *Black's Law Dictionary* 807 (5th ed. 1979)).

The ALJ also rejected petitioners' argument that respondent Stadtmiller was vicariously bound by the actions of her attorney. Pet. App. 44-45. The ALJ recognized that, to achieve the purpose of Section 33(g) to protect employers and their insurers from third-party settlements that would adversely affect their interests, a claimant should not be permitted to avoid the requirements of Section 33(g) by authorizing an attorney to enter into a third-party settlement for the claimant. To determine whether a claimant is bound by her attorney's third-party settlement in a particular case, the ALJ invoked the standard that would be applied by the court having jurisdiction over the civil action against the third-party defendant. Pet. App. 45. Applying the California law that would govern respondent Stadtmiller's third-party lawsuit, the ALJ concluded that respondent Stadt-

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Section 33(c), to seek damages from a third party. Section 33(c) provides:

> The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

33 U.S.C. 933(c).

miller is not bound by any settlement-related actions of her attorney because her attorney was not acting within the scope of his express or implied actual authority, her attorney was not acting with apparent authority, and respondent Stadtmiller had not subsequently ratified any purported settlement. *Id.* at 45-50.[2]

c. The ALJ denied petitioners' motion for reconsideration. 96-1163 Resp. Stadtmiller Br. in Opp. App. 1-9. The ALJ reaffirmed that, because the ordinary meaning of "legal representative" does not include an attorney, Congress did not intend to include attorneys within that statutory term. The ALJ also explained that the second reference to the term "representative" in Section 33(g) makes clear that the term was not intended to including attorneys. That reference is to settlements for less than "the compensation to which the person (or the person's representative) would be entitled" under the LHWCA. Although attorneys are entitled to recover attorney's fees under the LHWCA, they are not entitled, as attorneys, to "compensation" under the LHWCA. "Compensation" is defined in Section 2(12) of the LHWCA (33 U.S.C. 902(12)) to mean "the money allowance payable to an employee or to his dependents." 96-1163 Resp. Stadtmiller Br. in Opp. App. 4. Therefore, the ALJ concluded, to construe the term "representative" to include attorneys in Section

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[2] Because of its conclusion that respondent Stadtmiller was not bound by any settlement actions of her attorney and was not barred by Section 33(g) from receiving compensation under the LHWCA, the ALJ did not find it necessary to decide whether the attorney's actions, in fact, constituted the execution of a settlement agreement. Pet. App. 50-51.

33(g) "would make no sense." *Id.* at 3-4. The ALJ also rejected petitioners' contention that respondent Stadtmiller was aware that her attorney settled her lawsuit. *Id.* at 4-6.

4. The Benefits Review Board (Board) affirmed. Pet. App. 12-31. It concluded that the ALJ's construction of Section 33(g) is consistent with the plain language of the Act. The Board agreed with the ALJ that the term "representative" in Section 33(g) means "legal representative" of a decedent as set forth in Section 33(c), a phrase that does not ordinarily include an attorney. Pet. App. 19, 21-22. The Board also agreed that this interpretation of "representative" allows for a reasonable reading of the provision in Section 33(g)(1) that refers to entering into a settlement with a third party for less than the amount to which the "person (or the person's representative)" would be entitled under the LHWCA. Pet. App. 22. The Board reasoned that it would make no sense to interpret that provision as referring to attorneys, as petitioners urged, because "[w]hile a legal representative of the decedent may receive compensation" under the LHWCA, "his attorney cannot." *Ibid.*

Like the ALJ, the Board also concluded that respondent Stadtmiller was not bound by her attorney's actions under agency principles. Pet. App. 24-27. Specifically, the Board rejected petitioners' argument that respondent Stadtmiller had ratified the settlement. Applying the state law that would govern the third-party lawsuit, the Board ruled that the ALJ's finding that respondent Stadtmiller had not

ratified any settlement was rational, supported by the record, and in accordance with law. *Id.* at 26-27.[3]

5. The court of appeals denied petitioners' request to set aside the Board's order. Pet. App. 1-11. The court noted, as a threshold matter, that "considerable weight" is due the statutory construction of the LHWCA urged by the Director, Office of Workers' Compensation Programs (OWCP). *Id.* at 6. Thus, the court explained, if the Director's interpretation is reasonable, the court should defer to it. *Ibid.* (citing *Martin* v. *OSHRC*, 499 U.S. 144, 158 (1991)). The court concluded that, for the reasons stated by the Board, the Director's interpretation of "representative" in Section 933(g) should be upheld. Pet. App. 6-7.

The court emphasized that Section 33(c) of the LHWCA specifically defines "representative," for purposes of Section 33 (including Section 33(g)), to mean the "legal representative of the deceased." Pet. App. 7 (citing also *Aetna Life Ins. Co.* v. *Moses*, 287 U.S. 530, 539 (1932)). The court further explained that only the Director's interpretation of "representative" can be reconciled with the text of Section 33(g)(1), which refers to entering into settlements "for an amount less than the compensation to which the person (or the person's representative) would be entitled" under the LHWCA. Pet. App. 7 (quoting 33 U.S.C. 933(g)(1)). Although the legal representative of a deceased claimant can be entitled to compensation

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[3] The Board concluded that the ALJ properly determined that it was unnecessary to reach the question whether the execution of a settlement had, in fact, occurred, in light of its other rulings, although the Board noted that it appeared that there was no settlement on the facts presented. Pet. App. 28-31.

under the LHWCA, a decedent's attorney cannot be. Pet. App. 7. The court rejected petitioners' argument that the Director's interpretation frustrates the purpose of Section 33(g) to protect employers from inordinately low settlements. The court noted that an attorney cannot settle a case without some action by the client, *i.e.*, the claimant or his or her legal representative. Pet. App. 7.

The court of appeals also rejected petitioners' alternative argument that, assuming respondent Stadtmiller's attorney is not a "representative" for purposes of Section 33(g), respondent is nonetheless subject to the Section 33(g) bar because she ratified the settlement negotiated by her attorney. Pet. App. 8-10. The court ruled that petitioners did not meet their burden of proving that respondent Stadtmiller ratified the attorney's efforts. It agreed with the Board that the ALJ's finding that respondent Stadtmiller had not ratified any settlement agreement regarding the civil lawsuit was supported by substantial evidence, including the testimony of the attorney and of the third-party defendant. *Id.* at 9-10.

The court of appeals specifically rejected petitioners' argument that the question of ratification should be governed by federal law and that, under federal law, a client is bound by an attorney's unauthorized settlement. Pet. App. 8-9 n.2.[4] The court noted that "[t]he instances in which the courts are authorized to fashion federal common law are restricted to 'those in which a federal rule of decision is "necessary to protect uniquely federal interests,"

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[4] Petitioners had not argued before the Board that federal law should apply, but the court of appeals nevertheless addressed the issue.

and those in which Congress has given the courts the power to develop substantive law.'" *Ibid.* (quoting *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citations omitted)). In the court's view, this case did not fall into either category. It further ruled that, in any event, federal law establishes only a presumption that a settlement entered into by an attorney was authorized by the client, and rebuttal of the presumption renders any alleged settlement ineffective. Pet. App. 9 n.2.[5]

ARGUMENT

1. Petitioners contend (Pet. 13-18) that the attorney representing respondent Stadtmiller in her civil lawsuit against a third party was her "representative" as that term is used in Section 33(g)(1) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g)(1).

The plain language of Section 33 of the LHWCA refutes petitioners' interpretation. As the court of appeals correctly noted, Congress specified, in Section 33(c), that "legal representative of the deceased" is "hereinafter referred to as 'representative.'" 33 U.S.C. 933(c). The natural reading of that provision is that subsequent references in Section 33 to "representative"—including in Section 33(g)(1)—mean "legal representative of the deceased" and not some broader category, as petitioners urge. "Legal representative" commonly refers not to an attorney acting as legal counsel for an individual, but rather to a person who oversees the legal affairs of an

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[5] In light of its rejection of petitioners' ratification argument, the court of appeals did not reach the question whether respondent Stadtmiller's attorney, in fact, reached a settlement with the third-party defendant. Pet. App. 10 n.3.

individual, such as the executor or administrator of an estate or the court-appointed guardian of another. See *Black's Law Dictionary* 807 (5th ed. 1979).

In addition, limiting "representative" to "legal representative of the deceased" for purposes of Section 33(g)(1) is the only sensible construction of that term when read in the context of Section 33(g)(1) as a whole, which uses the term "representative" three times. As the court of appeals explained, one of those other uses is in referring to settlements for less than the compensation to which a "person (or the person's representative) would be entitled" under the LHWCA. 33 U.S.C. 933(g)(1). The term "representative" in that context cannot include an attorney serving as legal counsel for a claimant, because attorneys are not entitled to "compensation" under the LHWCA. Section 2 of the LHWCA, 33 U.S.C. 902, which furnishes the statutory definitions that govern throughout the LHWCA, provides that "'[c]ompensation' means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein." 33 U.S.C. 902(12). Attorneys are not entitled to any monies that are payable to an employee or his dependents under the LHWCA. Rather, the LHWCA specifies the instances in which attorneys, as legal counsel for others, are entitled to monies, and it makes clear that any such payments are in the form of reasonable attorney's fees. See 33 U.S.C. 928, 933(e)(1)(A); cf. *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 117 S. Ct. 796, 801-803 (1997) (in order to be "entitled to compensation" within the meaning of Section 33(g)(1), a person must be entitled to LHWCA compensation at the time of the settlement).

Congress used the term "representative" in a similar context in Section 33(e), a neighboring statutory provision to which the Section 33(c) definition of "legal representative" also applies. Section 33(e) governs the distribution of any recovery that an employer obtains by virtue of pursuing a third-party suit through an action assigned to it from a person entitled to compensation or from a legal representative of the deceased. Section 33(e) requires that the employer retain for itself an amount to cover its litigation expenses ("including a reasonable attorney's fee") and to cover the costs of all LHWCA benefits and compensation (both actually paid and payable in the future). 33 U.S.C. 933(e) If any monies remain in excess of that amount, the employer must pay that "excess to the person entitled to compensation or to the representative." 33 U.S.C. 933(e)(2). Also, if the amount set aside to cover future LHWCA payments is not exhausted at the conclusion of payments, the employer must pay the "excess thereof to the person entitled to compensation or to the representative." 33 U.S.C. 933(e)(1)(D). In light of the express provision in Section 33(e)(1)(A) for payment of attorney's fees, there can be no doubt that the term "representative" in Section 33(e) does not include an attorney acting as legal counsel. Section 33(e) thus confirms that attorneys are paid through reasonable attorney's fees authorized by the LHWCA, not through statutory "compensation," and that attorneys have no right to the residual of a third-party recovery. The Court followed that natural reading when it construed an earlier (although substantively similar) version of Section 33(e) in *Aetna Life Ins. Co.* v. *Moses*, 287 U.S. 530, 539 (1933) (describing Section 33(e), in a case where the person entitled to compensation was de-

ceased, as providing for payment of the excess of a third-party recovery to "to the representative of the deceased").[6]

There is no merit to petitioners' argument (Pet. 15) that interpreting "representative" in Section 33(g) to be limited to a representative of a decedent, as set forth in Section 33(c), will mean that minors and incompetents, who cannot settle except through a guardian or other representative, can never settle with a third party and obtain employer approval. See 33 U.S.C. 911 (deputy commissioner may require court appointment of a guardian or other representative to receive compensation payable to a person who is mentally incompetent or a minor). As used in Section 33(g), "person entitled to compensation" includes minors and incompetents who are entitled to compensation, and such persons may act through guardians or other representatives. Indeed, there is no dispute that even a person entitled to compensation, such as respondent Stadtmiller, who is not a minor or incompetent, may authorize another, including an attorney, to act on his or her behalf for purposes of Section 33(g), and that such a person would be bound by the actions of that attorney. That would be so, however, not because the attorney is a "representative" under Section 33(g)(1), but rather because the attorney's actions were authorized by the person entitled to compensation. See Pet. App. 45

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[6] Because Congress expressly defined "representative" for purposes of Section 33, and because that meaning is reinforced by the context in which that term is used in Section 33(e) and Section 33(g), it is irrelevant that, as petitioners note (Pet. 14-17), the term has different meanings in other sections of the LHWCA or in other statutes.

(ALJ opinion) (claimant cannot avoid Section 33 requirements by authorizing an attorney to enter into settlement on his or her behalf). Thus, Section 33(g)(1) provides for settlements by all persons entitled to compensation, including through authorized actions of their attorneys or guardians, as well as for settlements by legal representatives of decedents entitled to compensation.[7]

2. Petitioners contend (Pet. 19-21) that, even if respondent Stadtmiller's attorney was not her representative within the meaning of Section 33(g), the bar against recovery in Section 33(g) should nonetheless apply because the attorney settled respondent's case when he was acting as her agent and she should be bound by those acts under principles of agency law. Petitioners rely on federal law to support that proposition and contend that the court of appeals erred by applying state law. They also argue (Pet. 20) that, even if state law governed, the court of appeals erred in its interpretation of that law.

a. The court of appeals correctly rejected petitioners' contention that federal law should govern the question whether respondent Stadtmiller was bound by unauthorized settlement actions by her attorney in the civil lawsuit pending in state court. Pet. App.

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[7] Petitioners concede that the interpretation adopted by the court of appeals is a possible interpretation of the Act. See Pet. 13. Accordingly, the court of appeals correctly affirmed the Board and deferred to the interpretation urged by the Director of the Office of Workers' Compensation Programs. The Director is the policy-making authority whose views on questions of statutory and regulatory interpretation under the LHWCA should be given deference. Cf. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159-160 (1987); *Martin* v. *OSHRC*, 499 U.S. at 153.

8-9 n.2 (citing *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)); see also *Atherton* v. *FDIC*, 117 S. Ct. 666, 670 (1997) ("[n]ormally, when courts decide to fashion rules of federal common law," the existence of "a significant conflict between some federal policy or interest and the use of state law" is a precondition) (citing *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994)). In determining whether a person is bound by an attorney's settlement of a third-party civil tort action, the court of appeals (and the Director) reasonably looked to the law that would be applied by the court having jurisdiction over the third-party action, because the rights that are the subject of the settlement arose under that law. Petitioners have not identified any reason to fashion a different standard as a matter of federal common law.

In any event, petitioners err in suggesting (Pet. 19) that, under federal law, a client is bound by the actions of her attorney, regardless of whether the actions were authorized. The general retainer of an attorney does not give that attorney the power to compromise the client's claim. *United States* v. *Beebe*, 180 U.S. 343, 352 (1901). Although a judgment based on a compromise made by an attorney is presumed valid, that judgment will be set aside if it is proven that the attorney did not have special authority to make such a compromise. *Ibid.*

Petitioners ignore *Beebe* and erroneously argue that the decision below conflicts with decisions of this Court holding that a client is bound by an attorney's lack of due diligence in pursuing an appeal, *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 92-93 (1990), or in prosecuting an action, *Link* v. *Wabash R.R.*, 370 U.S. 626, 633 (1962). The basis for *Irwin* and *Link*, however, is the principle, now codified in

Fed. R. Civ. P. 5(b), that notice to an attorney is notice to the client. See *Irwin*, 498 U.S. at 92-93; *Link*, 370 U.S. at 634. Neither case purported to rule that a client is bound by an attorney's unauthorized settlement.

b. Petitioners' contention that the court of appeals misinterpreted state law also does not merit review. This Court rarely reviews a construction of state law by a lower court. See, *e.g.*, *Frisby* v. *Schultz*, 487 U.S. 474, 482 (1988). There is no reason to depart from that practice here. The court of appeals' interpretation is consistent with the well-settled law in California "that an attorney must be specifically authorized to settle and compromise a claim." *Blanton* v. *Womancare, Inc.*, 696 P.2d 645, 650 (Cal. 1985). Petitioners erroneously argue (Pet. 20) that *Blanton* is an exception to a more general rule, announced in *Gagnon Co.* v. *Nevada Desert Inn, Inc.*, 289 P.2d 466 (Cal. 1955), that a client is bound by an attorney's actions. In fact, *Gagnon* is the exception. See *Blanton*, 696 P.2d at 651 n.8 (noting that *Gagnon* had grappled with the "presumption" that an attorney has authority to settle in a case involving a collateral attack on another State's judgment and was "inapposite" in a case involving no collateral attack).

Petitioners maintain (Pet. 20-21) that respondent Stadtmiller ratified her attorney's unauthorized settlement actions by failing to take steps that the client in *Blanton* took. Petitioners, however, do not dispute that the court of appeals properly understood ratification to be a factual question requiring a showing "that the principal, knowing the facts, accepts the benefits of the agent's actions." Pet. App. 10. Here, the ALJ found that the principal, respondent Stadtmiller, never accepted the benefits of

the purported settlement. That finding was properly upheld by the Board and the court of appeals as supported by substantial evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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